

ELIMINATING THE UNFIT—IS STERILIZATION THE ANSWER?*

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Recent lower court decisions in California and Ohio have focused public attention on the use of sterilization as an instrument of social policy. The author traces the history of sterilization in the United States and analyzes current legislation and practices. The scientific premise upon which eugenic sterilization is based is now subject to considerable doubt. Nonetheless, sterilization has found questionable new support among those seeking to reduce welfare rolls.

I. EUGENIC STERILIZATION

Although in 1895 the word "eugenics" as it is used today was completely unknown, by 1917 fifteen states had adopted eugenic sterilization laws, and at the end of another twenty year period a total of thirty-one states had enacted such legislation. An examination of all the factors responsible for this rapid growth would encompass many economic and political factors which are beyond the scope of this article, but there is no doubt that three events which occurred at the end of the nineteenth century played a most important part in the adoption of legislation authorizing compulsory sterilization. They were the launching of the eugenics movement by Sir Francis Galton, the re-discovery of Mendel's laws of heredity, and the development of simple, non-dangerous surgical techniques for the prevention of procreation.¹

The term "eugenics" is derived from a Greek word meaning "well born." In 1883 Sir Francis Galton coined the word and defined it as "the study of agencies under social control that may improve or impair . . . future generations either physically or mentally."² In 1904

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¹ A few years prior to the rediscovery of Mendel's laws, Dr. Harry C. Sharp of the Indiana State Reformatory developed a method of sterilizing males (vasectomy) and at approximately the same time the now standard method of sterilizing females (salpingectomy) was discovered in France. A vasectomy requires the cutting of the vas deferens and a salpingectomy involves the tying or cutting of the fallopian tubes. Neither of these procedures are hazardous under modern surgical conditions nor do they materially lower sexual powers. Zenoff, "A Reappraisal of Eugenic Sterilization Laws," 10 Clev.-Mar. L. Rev. 149, 150 (1961).

² Deutsch, *The Mentally Ill in America* 357-58 (2d ed. 1949). The historical background of the eugenic movement is summarized from an excellent discussion on pages 355-70 of this book.

he officially launched the eugenics movement which had a two-fold aim: (1) positive eugenics—encouragement of the propagation of the biologically fit and (2) negative eugenics—discouragement of the reproduction of inferior stock. During this same period, the laws of heredity formulated by the Austrian monk, Gregory Mendel, forgotten since their publication forty years earlier, were rediscovered. Although Mendel's work had been confined to the transmission of simple traits in plants, the eugenicists assumed that the Mendelian principles were equally applicable to complex traits in human beings. The proponents of this view decided that mental illness, mental retardation, epilepsy, criminality, pauperism and various other defects were hereditary. Considerable agitation for corrective action was based upon the premise that these various conditions were hereditary. Since attempts at cure were considered futile for hereditary defects, measures which would prevent reproduction by "the unfit" appeared to be the only way to eliminate these conditions.

II. HISTORICAL BACKGROUND

Some of the proponents of eugenic sterilization were so zealous that they began sterilizing people before there was legislative authorization for the procedure. In the middle of the 1890's, F. Hoyt Pilcher, Superintendent of the Winfield Kansas State Home for the Feeble-Minded, castrated forty-four boys and fourteen girls. Public sentiment is considered responsible for the ending of this activity.³ Dr. Martin W. Barr, Superintendent of the Pennsylvania State Training School, claimed that he performed the first sexual sterilization to prevent procreation in 1889. Three years later when he was president of what is now known as The American Association on Mental Deficiency, he reported the operation and asked, "What state will be the first to legalize this procedure?"⁴ Another impatient eugenicist was Dr. Harry C. Sharp who devised the surgical operation known as vasectomy. He reportedly sterilized 600 or 700 boys at the Indiana reformatory before the adoption of the Indiana Act.⁵ It is also claimed that superintendents of institutions in several states were secretly sterilizing feeble-minded persons.⁶

The legislative history of eugenic sterilization began in 1897 when

³ Gosney & Popenoe, *Sterilization for Human Betterment* 14-15 (1929).

⁴ Van Roden, "Legal Trend of Sterilizations in the U.S.," 22 Penn. B.A.Q. 282, 287-88 (1951).

⁵ Gosney & Popenoe, *op. cit. supra* note 3, at 184; Laughlin, *Eugenical Sterilization in the United States* 325, 352 (1922).

⁶ Deutsch, *op. cit. supra* note 2, at 370.

a bill authorizing such operations was introduced in the Michigan legislature.⁷ This bill was defeated and it was Pennsylvania, eight years later, which became the first state to pass a sterilization bill. It was entitled "An Act for the prevention of idiocy" and required that "each and every institution . . . entrusted . . . with the care of idiots . . . to appoint a neurologist and a surgeon . . . to examine the mental and physical condition of the inmates."⁸ If, in their opinion, procreation was inadvisable, and there was no probability of improvement of the mental condition of the inmate, the surgeon was authorized "to perform such operation for the prevention of procreation as shall be decided safest and most effective." Governor Pennypacker refused to sign the bill and returned it to the senate with this message:

This bill has what may be called with propriety an attractive title. If idiocy could be prevented by an Act of Assembly, we may be quite sure that such an act would have long been passed and approved in this state. . . . What is the nature of the operation is not described, but it is such an operation as they shall decide to be 'safest and most effective.' It is plain that the safest and most effective method of preventing procreation would be to cut the heads off the inmates, and such authority is given by the bill to this staff of scientific experts The bill is, furthermore, illogical in its thought. . . . A great objection is that the bill . . . would be the beginning of experimentation upon living human beings, leading logically to results which can readily be forecasted. The chief physician . . . has candidly told us, . . . that 'Studies in heredity tend to emphasize the wisdom of those ancient peoples who taught that the healthful development of the individual and the elimination of the weakling was the truest patriotism—springing from an abiding sense of the fulfillment of a duty to the state'⁹

Although many sterilization bills have been introduced in Pennsylvania subsequent to this veto, none has succeeded in becoming law.

It was Indiana which finally enacted the first sterilization law in 1907, two years after Pennsylvania's first attempt.¹⁰ However, the Indiana statute was eventually declared unconstitutional¹¹ as were all other similar laws which came before the courts prior to 1925.¹²

⁷ *Ibid.*

⁸ Chellener, "The Law of Sexual Sterilization in Pennsylvania," 57 Dick. L. Rev. 298 (1953).

⁹ Vetoes by the Governor of Bills Passed by the Legislature, Session of 1905, p. 26.

¹⁰ Ind. Act 1907, ch. 215.

¹¹ *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921).

¹² *Haynes v. Lapeer*, 201 Mich. 138, 166 N.W. 938 (1918); *Smith v. Bd. of Examiners*, 85 N.J.L. 46, 88 Atl. 963 (Sup. Ct. 1913); *Osborn v. Thomson*, 103 Misc. 23, 169 N.Y. Supp. 638 (Sup. Ct.), *aff'd mem.*, 185 App. Div. 902, 171 N.Y. Supp. 1094

The statistics concerning sterilization during this early period are quite interesting. As of January 1, 1921, the states reported a total of 3,233 sterilizations performed since 1907, the beginning of legalized operations.¹³ If we add the known unauthorized operations in Kansas and Indiana, the total sterilizations up to 1921 is approximately 3,900. More than twenty percent of these operations were executed either without any statutory authority or under laws which were subsequently declared unconstitutional.¹⁴ The balance of the sterilizations took place under laws which had never been constitutionally tested. It is also noteworthy that although many people believed that sterilization is usually recommended for the mentally retarded rather than the mentally ill,¹⁵ more than eighty percent of the sterilizations reported in 1921 were performed upon mentally ill persons.¹⁶

III. BUCK v. BELL

The advocates of eugenic sterilization achieved a substantial victory in 1925 when the courts of two states held their sterilization laws valid. The first decision was rendered on June 18, 1925 by the Supreme Court of Michigan in the case of *Smith v. Wayne*.¹⁷ A few months later on November 12, 1925, in the case of *Buck v. Bell*,¹⁸ the Supreme Court of Appeals of Virginia held a sterilization statute to be a valid enactment under the state and federal constitutions. An appeal was taken from this decision to the United States Supreme Court. In a brief opinion which is probably best remembered for Mr. Justice Holmes' comment: "Three generations of imbeciles are enough," the Court held that the law in question was a reasonable regulation under the police power of that state and did not violate either the due process or the equal protection clause of the fourteenth amendment.¹⁹

(1918); Oregon State Bd. of Eugenics v. Cline, Circuit Court, Marion County (Dec. 13, 1921). This case was not appealed to the state supreme court because "the statute of this state does not authorize an appeal from the decision of the Circuit Court in this kind of case," letter from I.H. Van Winkle, Atty. Gen. of Oregon, June 23, 1922, quoted in Laughlin, *op. cit. supra* note 5, at 289 n.1.

¹³ Appendix C, Part I *infra*.

¹⁴ The states where statutes were declared unconstitutional reported the following total sterilizations: Ind. 120 (this figure represents only post 1907 sterilization); Mich. 1; Nev. 0; N.J. 0; N.Y. 42; Ore. 127, Laughlin, *op. cit. supra* note 5, at 96.

¹⁵ Comment, "What Has Happened to Kansas' Sterilization Laws?," 2 Kan. L. Rev. 174 (1953).

¹⁶ As of January 1, 1964, a total of 27,917 mentally ill persons and 32,374 mentally retarded persons had been sterilized.

¹⁷ 231 Mich. 409, 204 N.W. 140 (1925).

¹⁸ 143 Va. 310, 130 S.E. 516 (1925).

¹⁹ 274 U.S. 200 (1927).

Carrie Buck, the plaintiff in the case, was an eighteen-year-old woman committed to the Virginia State Colony for Epileptics and Feeble-Minded. She was the daughter of a feeble-minded mother and the mother of an illegitimate feeble-minded child. The Virginia court found that Carrie Buck was "the probable potential parent of socially inadequate offspring likewise afflicted. . . ."²⁰

No objection was made to the procedural provisions of Virginia law. Instead the attack was made upon the substantive law, the contention being that the sterilization order could not be justified upon the existing grounds. Justice Holmes speaking for the court said:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.²¹

This decision was followed by an abundance of eugenic sterilization legislation. Twenty statutes were passed in the ensuing ten years,²² most of them closely patterned after the Virginia law. Only nine cases²³ have been found, involving the validity of sterilization laws applicable to the mentally ill and the mentally retarded, since *Buck v. Bell*. Three of these laws were declared unconstitutional,²⁴ but they were based on procedural deficiencies rather than the substantive issues determined in *Buck v. Bell*. In the six cases which upheld the laws, five

²⁰ Va. Acts 1924, ch. 294, at 570. Subsequently, the facts presented to the courts concerning the *Buck* case have been subject to dispute. It is alleged that (1) Carrie Buck was a moron not an imbecile, (2) her daughter, the third generation imbecile, was only one month old when adjudged an imbecile by a Red Cross Nurse and (3) that this daughter who died in 1932 of measles, after completing the second grade, was reported very bright. O'Hara and Sanks, "Eugenic Sterilization," 45 Geo. L.J. 20, 31 (1956).

²¹ 274 U.S. at 207.

²² Note, "Human Sterilization," 35 Iowa L. Rev. 251, 253 (1950).

²³ *In re Opinion of Justices*, 230 Ala. 543, 162 So. 123 (1935); *Garcia v. State Dep't of Institutions*, 36 Cal. App. 2d 152, 97 P.2d 264 (Dist. Ct. App. 1939); *State v. Troutman*, 50 Idaho 673, 299 Pac. 668 (1931); *State ex rel. v. Schaffer*, 126 Kan. 607, 270 Pac. 604 (1928); *Clayton v. Bd. of Examiners*, 120 Nebr. 680, 234 N.W. 630 (1931); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933); *In re Main*, 162 Okla. 65, 19 P.2d 153 (1933); *Davis v. Walton*, 74 Utah 80, 276 Pac. 921 (1929); *In re Hendrickson*, 12 Wash. 2d 600, 123 P.2d 322 (1942).

²⁴ *Brewer v. Valk*; *In re Opinion of Justices*; *In re Hendrickson*, *supra* note 23.

rely on the decision in *Buck v. Bell*²⁵ and the sixth was concerned with the adequacy of the law's procedural provisions.²⁶

The only sterilization law considered by the United States Supreme Court subsequent to *Buck v. Bell* was an Oklahoma statute which provided for the sterilization of habitual criminals.²⁷ The Court held the law unconstitutional on the grounds that its exception of "persons convicted of offenses arising out of violation of the prohibitory laws, revenue acts, embezzlement or political offenses" violated the constitutional prohibition against class legislation. Although this case did not consider the same issues as *Buck v. Bell*, some legal scholars have suggested that Justice Jackson's concurring opinion might be interpreted as casting doubt upon the validity of all sterilization laws.²⁸ Critics of the *Buck v. Bell* decision have also speculated on the possibility of a reversal of opinion by the Supreme Court if a question is raised with respect to another eugenic sterilization law.²⁹ The reasons for this view and criticisms of *Buck v. Bell* will be discussed hereafter.

IV. ANALYSIS OF CURRENT STATUTES

At present twenty-six states have eugenic sterilization laws,³⁰ twenty-three of which are compulsory.³¹ Mentally retarded persons are subject to the laws in all of these states and in all but two states

²⁵ *State v. Troutman*, 50 Idaho 673, 299 P. 668 (1931); *State ex rel. v. Schaffer*, 126 Kans. 607, 270 Pac. 604 (1928); *Clayton v. Bd. of Examiners*, 120 Nebr. 234 N.W. 630 (1931); *Davis v. Walton*, 74 Utah 80, 276 Pac. 921 (1929).

²⁶ *Garcia v. State Dep't of Institutions*, 36 Cal. App. 2d 152, 97 P.2d 264 (Dist. Ct. App. 1939).

²⁷ *Skinner v. State*, 189 Okla. 235, 115 P.2d 123 (1941), *rev'd on other grounds*, 316 U.S. 535 (1942).

²⁸ "Morals, Medicine and the Law," 31 N.Y.U.L. Rev. 1157, 1234 (1956); Cook, "Eugenics or Euthenics," 37 Ill. L. Rev. 287 (1943).

²⁹ Zenoff, *supra* note 1, at 155. O'Hara & Sanks, "Eugenic Sterilization," 45 Geo. L.J. 20 (1956); Challener, *supra* note 8; Myerson, "Certain Medical and Legal Phases of Eugenic Sterilization," 52 Yale L.J. 618 (1943); Berns, *Buck v. Bell: Its Effects on Public Policy* 26 (unpublished thesis in University of Chicago Library 1951).

³⁰ Alabama, Arizona, California, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin. A total of thirty-one states have enacted such laws. The laws of New York, New Jersey and Washington were declared unconstitutional and have not been reenacted. See *Smith v. Bd. of Examiners*, 85 N.J.L. 46, 88 Atl. 963 (Sup. Ct. 1913); *Osborn v. Thomson* 103 Misc. 23, 169 N.Y. Supp. 638 (Sup. Ct.), *aff'd mem.*, 185 App. Div. 902, 171 N.Y. Supp. 1094 (1918); *In re Hendrickson*, 12 Wash. 2d 600, 123 P.2d 322 (1942). Kansas and North Dakota both repealed their statutes.

³¹ Connecticut, Minnesota and Vermont have voluntary sterilization laws. Connecticut changed from an involuntary to a voluntary law in 1965.

they are also applicable to the mentally ill.³² Epileptics are still included in fourteen states.³³ In twelve states criminals are subject to sterilization.³⁴ A few of these laws are clearly eugenic, two are clearly punitive,³⁵ and the purpose of the others is unclear. Seventeen of these laws apply to persons confined in hospitals or other institutions while nine laws also apply to persons who are not confined.³⁶

The involuntary procedure is usually commenced by an application from the superintendent of the institution to a designated administrative agency which has the authority to grant a sterilization order. Although most of the states now require notice, a hearing and judicial appeal, six states do not require a hearing³⁷ and three make no provision for judicial appeal.³⁸ The majority view of the few state supreme courts which have considered the procedural provisions of sterilization laws is that the patient must be given notice and accorded a hearing or else be allowed to appeal the sterilization order to a court.³⁹ Although a California district court of appeals came to a contrary decision,⁴⁰ the California sterilization law was subse-

³² Alabama and Nebraska. The Nebraska sterilization law included the mentally ill until 1957. Neb. Acts 1957, ch. 391.

³³ Arizona, Delaware, Idaho, Indiana, Mississippi, Montana, New Hampshire, North Carolina, Oklahoma, Oregon, South Carolina, Utah, Virginia, West Virginia.

³⁴ Cal. Pen. Code §§ 645, 2670; An Act to Modify the Statute Concerning Operations to Prevent Procreation, Conn. P.A. 536 (1965); Del. Code Ann. tit. 16 § 5703 (1953); Ga. Code Ann. § 99-1303 (1955); Idaho Code Ann. § 66-803 (1949); Ia. Code Ann. § 145.2 (Supp. 63); Mich. Stat. Ann. §§ 14.381, 14.382 (Supp. 1965); Okla. Stat. tit. 43A § 341 (1961); Ore. Rev. Stat. 436.010 (1965-1966); Utah Code Ann. § 64-10-7 (Supp. 1961); Wis. Stat. Ann. § 46.12 (1957).

³⁵ California provides for sterilization as a penalty for the crime of carnal abuse of a female under ten, Cal. Pen. Code § 645. Washington has a similar statute. Wash. Rev. Code Ann. § 9.92.100 (1961). Nevada also had a similar law but it was declared unconstitutional in *Mickle v. Henrichs*, 262 Fed. 687 (D.D. Nev. 1918) and was repealed by chapter 45 of the 1961 Statutes of Nevada.

³⁶ Delaware, Idaho, Iowa, Maine, Michigan, North Carolina, Oregon, South Dakota, Utah, Vermont. In Maine, the sterilization of persons outside of institutions can only be done on a voluntary basis. The Vermont statute is for both institutionalized and non-institutionalized persons.

³⁷ Alabama, Delaware, Maine, Oregon, South Dakota, (mentally ill)—Wisconsin; California provides a hearing if an objection is filed. See Appendix B, Procedural Requirements, *infra*.

³⁸ Alabama, Delaware, Wisconsin. See Appendix B, Procedural Requirements, *infra*.

³⁹ *In re* Opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935); *Williams v. Smith*, 190 Ind. 526, 131 N.E. 2 (1921); *State ex rel. Smith v. Schaffer*, 126 Kan. 607, 270 Pac. 604 (1928); *Brewer v. Valk*, 204 N.C. 186, 167 S.E. 638 (1933).

⁴⁰ *In Garcia v. State Dep't of Institutions*, 36 Cal. App. 2d 152, 97 P.2d 264 (Dist. Ct. App. 1939), the plaintiff sought a writ of prohibition on the ground that the statute did not provide notice, hearing, or judicial review. The court held that "The petition . . . does not state facts sufficient to justify this court in issuing its writ as prayed." *Ibid*.

quently amended in 1951 and now provides for both notice and judicial appeal.⁴¹ The usual ground for issuing the sterilization order is that "according to the laws of heredity, the person is the probable potential parent of socially inadequate offspring likewise afflicted."⁴²

On only twenty-three occasions have cases involving the sterilization of inmates of state institutions come before the courts.⁴³ According to the Human Betterment Association, one would expect to find the curtailment of rights in an area as important as procreation strongly contested. They conclude that the dearth of cases "speaks well not only of the care and forethought state legislators have given to the consideration of the provisions of the laws but also of the care exercised in their application by administrators."⁴⁴

However, it is possible that the lack of cases is due to other reasons. One of them could be the inability of a mentally ill or mentally retarded person to handle his defense. For that matter it is possible that he does not even understand the nature of the action. In most proceedings affecting personal or property rights, it is taken for granted that the parties are represented by attorneys. Where they cannot afford legal representation, it is usually provided by legal aid, a public defender or a court-appointed counsel who receives compensation from the state. It will be noted from Appendix B, *infra*, that very few states provide for court appointed counsel in sterilization proceedings. It is impossible to estimate what effect this policy may have had on the status of sterilization legislation. For example, it has been asserted that the suit in *Buck v. Bell* was a friendly one selected by the superintendent of the State Colony for Epileptics and Feeble-minded to be used as a test case. Carrie's guardian is alleged to have been appointed by the state, not the county, and to have been paid twenty-five dollars for the entire case which averaged out to one dollar a month.⁴⁵

⁴¹ Cal. Welfare & Int'ns Code § 6624.

⁴² See Appendix A, *infra*, for specified conditions justifying the granting of a sterilization order in the various states.

⁴³ Human Betterment Association of America, Summary of United States Sterilization Laws 2 (1958). See also Clarke, Social Legislation 203 (1957); Hughes, "Eugenic Sterilization in the U.S.," Public Health Reports 22-41 (Supp. No. 162, 1940).

⁴⁴ Human Betterment Association of America, *op. cit. supra* note 43, at 2.

⁴⁵ O'Hara & Sanks, *supra* note 29, at 31. In some jurisdictions, although the law is an involuntary one, in practice it is used only on a voluntary basis. This policy may be the reason for the dearth of litigation in these states. Another reason may be the fact that in many states sterilization is a prerequisite to release from an institution.

V. STERILIZATION PRACTICES

The number of sterilizations per year has decreased steadily during the last twenty years from 1638 in 1943 to 467 in 1963.⁴⁶ Currently, five states are not using their eugenic sterilization laws. In fact no operations have been performed in any of these states for approximately ten years.⁴⁷ In eight other states, operations have averaged seven or less per year in the period 1959 to 1964.⁴⁸ Only six states averaged more than fifteen operations per year during this period and even these states with the exception of Delaware show a steady decrease in the number of sterilizations performed between the years 1943 and 1963.⁴⁹

The decrease is probably due to a rejection of the view that mental illness and mental retardation are hereditary. The decrease was not caused by court decisions. Sterilization orders have not been attacked in the courts during this period. Nor have there been many amendments of the sterilization laws by the state legislatures. California did change its procedures to provide for a hearing in 1951 and there was a sharp drop in the number of operations after this amendment. However, California officials point out that the number of sterilizations began to drop sharply several years prior to the amendment. In 1943 there were 459 sterilizations in the state but by 1951 the number of operations had dropped to 150. State officials believe that the downward shift in the California sterilization rate reflects a change in the

⁴⁶ See Appendix C, Part II, Sterilizations in the United States, *infra*. Statistical information, unless otherwise cited, is based on the compilation Human Betterment Assoc. for Voluntary Sterilization Inc., "Sterilizations Performed Through Dec. 31, 1963 Under U.S. Sterilization Statutes Primarily for the Institutionalized Mentally Ill and Mentally Deficient."

⁴⁷ The Alabama law has been inoperative since the advisory opinion of the Alabama Supreme Court, *In re Opinion of the Justices*, 230 Ala. 543, 162 So. 123 (1935). Letter from Dr. J. S. Tarwater, Superintendent of the Alabama State Hospitals and the Partlow State School dated Oct. 17, 1960 quoted in Paul, State Eugenic Sterilization Laws in American Thought and Practice, 250 n.9 (unpublished manuscript at Walter Reed Army Institute of Research). Arizona, no operations since 1956; Mississippi, 1955; Montana, 1954; Oklahoma, 1956; W. Virginia, 1957.

⁴⁸ Idaho, Maine, Mississippi, New Hampshire, South Carolina, South Dakota, Utah and Wisconsin. The two states that had voluntary eugenic sterilization laws during this period also reported very few operations. Minnesota averaged 3 a year and Vermont had none.

⁴⁹ Georgia, Iowa, Michigan, North Carolina, Oregon, Virginia. When only the last year of the period is examined the number of states remains the same. Delaware is substituted for Georgia. Operations in Georgia decreased to 7 in 1963 and Delaware's increased to 25. See Appendix C, Part II, *infra*.

attitude of the people who administer the law about the hereditary aspects of and need for sterilizations, rather than a response to outside pressure.⁵⁰

The variation in the use of sterilization laws from state to state also appears to be caused by different views about the hereditary nature of mental disability and the desirability of the operation. This topic will be discussed subsequently.

The difference in the rate of sterilizations performed annually in each state has little relationship to the population differences between the states. For example, California with a population of over eighteen million people performed seventeen sterilizations in 1963 while North Carolina with a population of not quite five million sterilized 240.⁵¹ Nor is the difference in the number of sterilizations between the states necessarily related to the substantive or procedural provisions of the law. For example, Virginia which reports the second highest number of annual sterilizations limits the application of its law to a eugenic basis and has strict procedural requirements, performed 39 sterilizations while Wisconsin, which has approximately the same population, may sterilize "when procreation is inadvisable" and there are no specific provisions for objections, guardian ad litem, transcripts or judicial review, reported eight sterilizations.⁵²

Virginia sterilization procedures were studied during a seven state study of "The Mentally Retarded and the Law" conducted by the Institute of Law, Psychiatry and Criminology of the George Washington University. A random sample of sterilization records at two state hospitals for the retarded and observations of four hearings showed that the state meticulously observes the procedural requirements of notice, appointment of a guardian ad litem, patient's presence at hearings, etc.⁵³ However, the guardian ad litem said little or nothing at the four hearings observed.

It is of interest that in Virginia there appears to be little difficulty

⁵⁰ See Paul, *State Eugenic Sterilization Laws in American Thought and Practice*, 267 & nn. 18-21 (unpublished manuscript at Walter Reed Army Institute of Research).

⁵¹ Other examples are Delaware, population 505,000, 1963 sterilizations 25, as compared to Oklahoma, population 2,482,000, sterilization 0; Virginia, population 4,457,000, sterilizations 39 as compared with Wisconsin, population 4,144,000, 19 sterilizations 8. See Council of State Governments, *Book of the States 1966-67*, 516-568 (1966) for population figures based on Bureau of Census 1965 estimates and Appendix C, Part II Sterilizations in the United States, *infra* for sterilization estimates.

⁵² *Ibid.*

⁵³ Nineteen cases at one hospital and ten cases at another hospital for the year 1965 were selected on a random basis.

in proving that the conditions are hereditary while several other states reported that they are unable to furnish such proof.⁵⁴ It is not necessary to furnish such proof in many jurisdictions because the statute authorizes sterilization on such grounds as "for the good of the patient and society."

A large number of states do not have "to prove" anything because they operate their laws only on a voluntary basis. Again, there does not seem to be any relationship between this policy and the rate of sterilizations per year. North Carolina, the state with the highest number of sterilizations operates its program on a voluntary basis but so do several states with much lower annual rates.⁵⁵

The reasons for the policy of performing sterilizations only when consent of the person or a relative has been obtained are not known. The policy may be motivated solely by therapeutic considerations. However, the constitutionality of many of these laws has never been tested. The use of consent may be motivated by a desire to avoid an attack on either the procedures or the substantive basis of the laws.

The belief that mental illness, mental retardation and criminality are inherited was the basis of the eugenicists argument for compulsory sterilization and was also the basis of the United States Supreme Court's opinion that the Virginia sterilization law was constitutional. The consistent downward trend of sterilization statistics for a period of two decades may mean that attitudes towards the inheritability of these conditions have changed. However, even if there has been a change of attitude, a prediction that in another two decades the United States will no longer have involuntary sterilization laws is not justified. Mental illness, mental retardation and criminality still exist in this country and many people now urge that the mentally ill, the mentally retarded and criminals are unfit parents and should be sterilized for that reason. It is worthy of note that approximately seventy percent

⁵⁴ See, e.g., Idaho, New Hampshire, Utah. See also Paul, *op. cit. supra* note 50, at 332, 416, 482 for correspondence with state officials on this subject.

⁵⁵ See e.g., Indiana. The population of Indiana is 4,885,000 as contrasted to North Carolina's 4,914,000. Both states allow sterilization on non-eugenic grounds and both operate their laws on a consent of the person or a relative. See Biennial Report of The Eugenics Board of N.C. 7 (1964) and Note, "Eugenic Sterilization in Indiana," 38 Ind. L.J. 275, 278 (1963). Indiana reported 12 sterilizations in 1963 and North Carolina 240. The majority of North Carolina sterilizations are on non-institutionalized persons but the rate for institutionalized persons is still three times that of Indiana. Other states which operate their laws on consent of a patient or relative are California, Iowa, Oregon and Wisconsin. See Paul, *op. cit. supra* note 50, Chapter 2, "An Analysis of American Sterilization Experience and Current Policies on a State by State Basis."

of reported sterilizations in 1963 took place in four states in which sterilization on non-eugenic grounds is authorized.⁵⁶

VI. CURRENT VIEWS ON STERILIZATION LEGISLATION

A. *Scientific*

The American Neurological Association's Committee for the Investigation of Eugenical Sterilization summarized the main arguments of the proponents of sterilization as follows:

1. Mental illness, mental deficiency, epilepsy, pauperism and certain forms of criminality are steadily increasing;
2. Persons with these diseases propagate at a greater rate than the normal population;
3. These conditions are hereditary;
4. Environment is of less importance than germ plasm in the creation of these conditions. Implicit and sometimes explicit in this point of view is that eugenics is against natural selection because it keeps alive the unfit and therefore, is against the racial welfare.⁵⁷

Although it was accepted by the state legislatures and the courts that at least the inheritability of these conditions had been scientifically proven, studies undertaken in the last twenty-five years have thrown substantial doubt upon this conclusion.⁵⁸ The most important of these studies was that conducted by the American Neurological Association. They made the following answers to the statements of the advocates of eugenic sterilization laws:

1. There is nothing to indicate that mental disease and mental defect are increasing, and from this standpoint there is no evidence of a biological deterioration of the race.⁵⁹
2. The reputedly high fecundity of the mentally defective groups . . . is a myth based on the assumption that those who are low in the cultural scale are also mentally and biologically defective.⁶⁰

⁵⁶ North Carolina 51%, Michigan 7%, Iowa 6%, Delaware 5%. See Appendix C, Part II, Sterilizations in the United States, *infra*.

⁵⁷ Committee of the American Neurological Association, Eugenical Sterilization 24-25 (1936). See also Clarke, Social Legislation 193-94 (1957).

⁵⁸ For comprehensive discussions of the various studies see Deutsch, *The Mentally Ill in America* 354-386 (2d ed. 1949); Cook, *supra* note 28, at 291-326; Committee of the American Neurological Association, *op. cit. supra* note 57, at 28-175.

⁵⁹ Committee of American Neurological Association, *op. cit. supra* note 57, at 56.

⁶⁰ *Id.* at 57.

3. Any law concerning sterilization . . . under the present state of knowledge (of heredity) should be voluntary . . . rather than compulsory.⁶¹
4. Nothing in the acceptance of heredity as a factor in the genesis of any condition considered by this report excludes the environmental agencies of life as equally potent, and in many instances as even more effective.⁶²

Concerning the claim of eugenicists that the efforts of society to help the unfit works against the welfare of the race the Committee said: "It is precisely in those communities where social care is good that we find the evidence of the finest culture and, on the whole, the best biology. It is in those communities where social care is poor that the population presents an appalling spectacle of degradation."⁶³

One year later the American Medical Association's Committee to Study Contraceptive Practices and Related Problems reported: "Our present knowledge regarding human heredity is so limited that there appears to be very little scientific basis to justify limitation of conception for eugenic reasons. . . . There is conflicting evidence regarding the transmissibility of epilepsy and mental disorders."⁶⁴

A recent opinion to the same effect is that expressed by the Mental Health Committee of the South Dakota Medical Association in the Explanation of the Proposed South Dakota Mental Health Act:

Medical science has by no means established that heredity is a factor in the development of mental disease with the possible exception of a very few and rare disorders. The Committee holds that the decision to sterilize for whatever reason, should be left up to the free decision reached by patient and family physician mutually and that the State has no good reason to trespass in this area.⁶⁵

The scientific arguments against sterilization were ably summarized in 1960 by Dr. Bernard L. Diamond when he served as a special consultant to the American Psychiatric Association for its report on mental health legislation in British Columbia:

[A]ll laws providing for the sterilization of the mentally ill or defective which have as their basis the concept of the inheritability

⁶¹ *Id.* at 178.

⁶² *Ibid.*

⁶³ *Id.* at 58.

⁶⁴ American Medical Association, Proceedings 54 (May, 1937).

⁶⁵ Mental Health Committee, S. D. Medical Association, Explanation of Proposed S. D. Mental Health Act 9 (1959); See also Comment, *supra* note 15, at 178 for results of questionnaire sent to psychiatrists concerning desirability of Kansas sterilization law.

of mental illness and mental deficiency are open to serious question as to their scientific validity and their social desirability.

Laws of this type followed logically from prevailing psychiatric concepts of the late 19th and early 20th centuries, in which mental illness, be it psychosis, psychoneurosis, or mental deficiency, was regarded as inherited deficiencies or weaknesses. Particularly in relation to mental deficiency, the development of fairly precise tests of intelligence, such as the Stanford-Binet test, promulgated the idea that intelligence was a fixed attribute of the individual and was primarily determined by genetic factors. Legislative bodies were impressed by lurid clinical descriptions of the Jukes and the Kallikaks—families in which antisocial behavior or mental deficiency recurred in generation after generation.

Present day psychiatry, although still vitally interested in the possible genetic factors in mental illness and mental deficiency, avoids the sweeping generalizations so prevalent in the past. Genetics has evolved into a much more precise science and very significant work is being done on the inheritance of mental illness. Nevertheless, this is a field of great conflict; there has been much learned in recent years of the impact of environment on child development; of the essential role of psychodynamic factors in personality development and production of mental illness; and of the susceptibility of the child *in utero* to unfavorable metabolic and infectious conditions of the mother.

In short, the present state of our scientific knowledge does not justify the widespread use of the sterilization procedures in mentally ill or mentally deficient persons. . . .

It is sometimes proposed that sterilization is demanded, irrespective of the uncertainties of our knowledge of heredity, in that a mentally ill or feeble-minded person is incapable of providing the emotional and material environment required to raise a normal child. Perhaps this is so, but it raises issues of a sociological and political nature of a very uncertain character and it may be most dangerous to apply such sociological concepts under the guise of a genetic thesis that is far from proven and highly uncertain in its application.⁶⁶

No attempt has been made to make a complete survey of recent scientific literature and count the number of proponents and opponents of sterilization laws or to evaluate their arguments. These are tasks beyond the author's qualifications. However, the views presented here do show that there is a conflict of opinion about the inheritability of the conditions covered by eugenic sterilization laws. The existence of this conflict is extremely important because to date the legislatures and the courts have assumed that there was undisputed proof of the hereditary nature of these conditions.

⁶⁶ Diamond Report, Section III, Miscellaneous Statutes 10-11 quoted in Paul, *op. cit.* *supra* note 50, at 658-61.

B. *States Without Sterilization Laws*

The most reliable indication of a state's attitude about sterilization laws is of course, the presence or absence of such legislation. There are twenty-four states which do not have sterilization laws. Nineteen of these states have never had a sterilization law.⁶⁷ Opinions of institution personnel, judges and organizations who work with the mentally disabled are not state policy but their attitudes towards sterilization would undoubtedly be given serious consideration by legislators.

Institution personnel, including superintendents, assistant superintendents, staff physicians and social workers in six states without sterilization laws⁶⁸ were asked about institution policy and their own attitudes towards sterilization by the study on *The Mentally Retarded and the Law*. In four of these states, operations are not performed at the institution and the institution does not recommend that the operation be done elsewhere. In the fifth state, parents occasionally take the retarded child to the family physician for the operation but this action is neither approved nor disapproved by the hospital.

Parents, in the sixth state, are sometimes told that a child could possibly return to the community if the operation were performed. One institution official in that state reported that he had performed 50 to 60 sterilizations during the last two years always with parental permission.⁶⁹ He has a theory that the operation has beneficial effects on a variety of conditions including excessive masturbation, menstrual problems, excessive body hair and acne. Another institution physician in the same state said: "I, on occasion have let my knife slip in surgery and cut the tubes but with most nurses present I would not do it as they have large mouths." Two opinions of the state attorney general within the last six years have advised the institutions that they do not have statutory authority to perform such operations and that the consent of the parents is not sufficient authorization.

There were other staff members of the institutions within this state who favored a sterilization law besides the two physicians who reported performing sterilization operations. However, a contrary view was expressed by the officials who wrote the state plan to combat mental retardation. They said, "It is questionable whether . . . legislation providing for eugenic sterilization of the mentally retarded is desirable or necessary at this time." They also advised that a re-

⁶⁷ Kansas, New Jersey, New York, North Dakota and Kansas formerly had sterilization laws. See, *Analysis of Sterilization Laws, infra*.

⁶⁸ Florida, Illinois, Maryland, Massachusetts, New Jersey, and Washington.

⁶⁹ Note that these sterilizations alone would give the state a sterilization rate of 25 to 30 a year which is higher than the reported rate of 20 states which have sterilization laws.

evaluation of the ground upon which compulsory sterilization is based should be made before any legislation is considered.

Institutional personnel favored a sterilization law in only one additional study jurisdiction. The principal reason advanced was that many girls would be released because they are being kept in institutions for the sole reason that it is feared they might become pregnant.⁷⁰

In the other four jurisdictions, institution officials were opposed to involuntary sterilization laws. One superintendent said that many girls who could be in the community are committed solely because a judge thinks they might become pregnant. He believes that this is an unfortunate situation but is happy that his state does not have a sterilization law. Some officials in these states do not consider pregnancy a problem because "contraceptive devices have made sterilization obsolete." Another official said that pregnancy is not a great problem for the retarded because the rate of pregnancies of normal high school girls who become pregnant is much higher than the rate of retardates.

Intrauterine devices and pills are preferred to sterilization because they are not permanent. One interviewee drew an analogy between life imprisonment and a death sentence, in the sense that if a mistake is made it can be reversed if an intrauterine device has been used. Other interviewees preferred birth control devices because they believe some retarded persons can function as parents after counselling and treatment.

Most of the interviewees who opposed sterilization mentioned at least two of the reasons listed below:

1. The difficulty of determining who should be sterilized because of the imperfections of intelligence tests and the lack of knowledge concerning the role of cultural deprivation in familial retardation;
2. The doubt that anyone is qualified to make decisions about who should be sterilized;
3. The fear that sterilization laws will be used punitively;
4. The belief that involuntary sterilization is immoral.

All of the state planning reports on mental retardation discuss prevention, but none of them recommend involuntary sterilization legislation to achieve this goal. Two states, Colorado and Kentucky, recommend the adoption of a voluntary sterilization law,⁷¹ but most

⁷⁰ Only two other study states without sterilization laws had issued their planning reports at the time this article was prepared. Neither of them referred to sterilization.

of the recommendations concern improved prenatal care, greater use of measles vaccine, routine testing of infants for phenylketenuria (PKU), genetic counselling, establishing pre-nursery schools for children from deprived homes and intensive research into the biological and behavioral causes of retardation.

The opinion that reduction of public welfare costs justifies the use of sterilization has been expressed by several judges during the last few years. In addition to expressing their views, they have acted on them by ordering sterilizations despite the lack of an applicable sterilization law.

Two of the judges preside over probate courts in Ohio, a state which has never had a sterilization law. They have ordered the sterilization of five mentally retarded females and one of the judges has said that he intends to continue this practice.⁷² The reasons for the decisions and the legal theory on which they are based are given in the opinion, *In re Simpson*,⁷³ the first of these cases to attract public attention.

In 1962 Rosie Lee Simpson filed an affidavit in the probate court of Muskingum County alleging that her eighteen-year-old daughter Nora Ann was "feeble-minded." There was undisputed evidence that Nora Ann had an I.Q. of 36, was unable to care for her year old illegitimate child, and had been promiscuous with a number of men since the birth of her child.

The court took judicial notice of the fact that the county's 1962 quota of commitments to the Columbus State Hospital had been filled for many months and that the waiting list for 1963 was nearing the quota limit.

The court ruled that Nora Ann was "feeble-minded" within the meaning of the statute⁷⁴ and ordered her to submit to an operation

⁷¹ A statute is needed providing immunity from civil and criminal sanctions to physicians who perform voluntary sterilization of the mentally retarded, patterned after the existing statutes on the subject of the State of Virginia. Colorado, A Plan for the Mentally Retarded. These Truths Are Evident 87 (1965). "Permissive attitude toward voluntary sterilization of persons desirous of avoiding continued or probable defective births should be fostered. Legislation to reinforce this permission would be desirable." Kentucky, Pattern for Mental Retardation Programs and Services 45 (1965).

⁷² "We have about six cases ahead on our quota for the Columbus State School. I will continue to follow the same procedure set forth in the opinion of the *Simpson* case." Letter from Judge Gary to Julius Paul dated Dec. 2, 1964.

⁷³ 180 N.E.2d 206 (Ohio P. Ct. 1962).

⁷⁴ "Mentally deficient" or "feeble-minded" . . . refers to any person whose intellectual development has been retarded from birth or from an early age and whose intellectual and social capacity is below normal for his chronological age to such an extent that he lacks sufficient control, judgment and discretion to manage himself and his

which would prevent the birth of additional children "such operation having been found to be necessary for the health and welfare of said Nora Ann Simpson."⁷⁵

The court relied on section 5125.30 of the Ohio Revised Code which provides that the probate judge shall "make such order as he deems necessary . . . to provide for the detention, supervision, care and maintenance of feeble-minded persons . . ." ⁷⁶ when the hospital is unable to receive them as authority for his sterilization order. He also cited section 2101.24 of the code: "The probate court shall have plenary power at law and in equity fully to dispose of any matter properly before the court, unless the power is expressly otherwise limited or denied by statute."⁷⁷ The court claimed that the authority granted to it by the statutes is extremely broad.

The fact that the interpretation was extremely broad is not disputed, but the interpretation has been severely criticized. After a full discussion of the court's reasoning, a recent article concluded that "It is difficult if not impossible to avoid the conclusion that this court has simply conjured up a novel power without historical or statutory basis."⁷⁸ Another law review article called *In re Simpson* the best example of "perversion of the law."⁷⁹

The judge's reasons for ordering the operation were that it was in the best interest of Nora Ann and society. The advantage to Nora Ann was that she would be condemned "to a lifetime of frustration of drudgery as she continued to bring children into the world for whom she was not capable . . . of providing proper care."⁸⁰ Society will benefit by saving on welfare payments:

Application has been made to the Muskingum County Welfare Department for Aid for Dependent Children payments for the child already born. To permit Nora Ann to have further children would

affairs, and who by reason of such deficiency for his own welfare or the welfare of others of the community, requires supervision, guidance, care or control." Ohio Rev. Code Ann. § 5125.24 (Page 1953). The word "feeble-minded" has subsequently been replaced by "mentally retarded" in Ohio. "Mentally retarded . . . means having subnormal intellectual functioning originating in the developmental period prior to age eighteen and is characterized by reduced learning capacity including accompanying inadequate social adjustment as determined by comprehensive evaluation or as determined by a court of record upon such evidence as is deemed satisfactory by such court to establish the existence of mental retardation. Ohio Rev. Code Ann. § 5125.011 (Page Supp. 1965).

⁷⁵ *In re Simpson*, 180 N.E.2d 206, 208 (1962).

⁷⁶ *Id.* at 207.

⁷⁷ *Ibid.*

⁷⁸ Note, "Sterilization of Mental Defectives" 61 Mich. L. Rev. 1359, 1364 (1963).

⁷⁹ Note, "Compulsory Sterilization of Criminals—Perversion in the Law; Perversion of the Law," 15 Syracuse L. Rev. 738, 753 (1964).

⁸⁰ *In re Simpson*, 180 N.E.2d 206, 207 (1962).

result in additional burdens upon the county and state welfare departments which have already been compelled to reduce payments because of shortage of funds and have consistently importuned the General Assembly for additional appropriations.⁸¹

Although the opinion mentioned no evidence of the hereditary nature of Nora Ann's "feeble-mindedness" the judge prophesied that "there is further probability that such [future] offspring will also be mentally deficient and become a public charge for most of their lives."⁸²

Although the judge subsequently issued sterilization orders for a fifteen year old girl and a young married woman, again without benefit of sterilization law, he does favor such legislation.⁸³ He testified in favor of a sterilization bill before the state legislature in 1963 and urged the adoption of such legislation in an address before the Ohio Welfare Conference: "I appeal to you to start a campaign in your own community for compulsory sterilization. This is a positive action which can be taken to help reduce the ever-expanding cost of public welfare."⁸⁴

In 1966, another Ohio probate judge issued sterilization orders for mentally retarded sisters aged nineteen and twenty-two and wrote an opinion which is substantially similar to *In re Simpson*.⁸⁵

In addition to the Ohio cases, there have been three California sterilization cases in the last few years. California law provides for sterilization of the mentally ill, the mentally retarded and certain sex offenders. However, the code provisions were not applicable to any of these cases and were not relied on by the courts.⁸⁶ In each case the sterilization order was a condition of probation.

Miguel Andrada chose probation rather than a jail sentence when he pleaded guilty to a charge of non-support of his minor children.

⁸¹ *Ibid.*

⁸² *Ibid.*

⁸³ Letter from Judge Gary to Julius Paul dated November 18, 1964.

⁸⁴ Quoted in Paul *op. cit. supra* note 50 at 601 n.9.

⁸⁵ Due to their physical attractiveness and considering their mental capacity and further considering the medical testimony these girls would in all probability continue to be promiscuous and likely to again become pregnant. There is still the probability that such offspring would become mentally deficient and become public charges the same as the two young mothers are at the present time. This would present an additional burden upon the mother, State and County Welfare Departments, where support payments have of necessity been reduced due to lack of funds.

Quoted in Paul, *op. cit. supra* note 50 at 597A. Paul says that Judge Freehofer of the Richard County Probate Court, author of the opinion, gave him a copy but it was undated and the girls' names deleted.

⁸⁶ See text accompanying notes 30-45, *supra*.

After the operation, he regretted the decision and began litigation⁸⁷ which culminated in his asking the United States Supreme Court to review the case and decide if "conditioning probation upon sterilization constituted cruel and unusual punishment and violated procedural due process."⁸⁸ However, the Supreme Court denied certiorari.⁸⁹

This was not the first case, and presumably not the last case in which the Pasadena Municipal Court Judge offered probation conditioned on sterilization in non-support cases.⁹⁰

In the second case, *People v. Tapia*,⁹¹ a man and a woman were convicted of a conspiracy to defraud the welfare department. The defendants were offered a reduction of their sentence which would have the effect of fixing their crimes as misdemeanors rather than felonies⁹² and also a reduction of the probation period to be spent in jail from one year to six months "upon the filing of a stipulation by counsel or a report from the Santa Barbara County Hospital that the defendants have voluntarily submitted to the operations."⁹³

During the hearing on probation and sentencing the judge appeared torn between his belief that the county welfare department wished to make an example of this case to deter others and the fact that the crime specified in the code was a misdemeanor.⁹⁴ The basis of the male defendant's conviction appeared to be the jury's finding that he had "knowledge of the existence of this peculiar Welfare and Institutions Code Rule which makes a man under these circumstances or tries to make him at any rate responsible for the support of children who are not his own and who are also living in the family."⁹⁵ Although the probation officer recommended against probation because the defendant still denied his crime and was therefore unrepentant, the judge believed this should not be controlling because Mr. Palafax did

⁸⁷ The California Supreme Court ruled that Andrada was not entitled to state habeas corpus relief. 33 U.S.L. Week 3278 (1965).

⁸⁸ *Ibid.*, See A.M.A., Vol. 10, Citation 220 (1965) for further information about the petition.

⁸⁹ *In re Andrada*, 380 U.S. 953 (1965).

⁹⁰ "It has not been uncommon for me to suggest to defendants that they ought to limit the size of their families, to inquire whether or not they are acquainted with the operation vasectomy and in some instances refuse to grant probation unless this operation was accomplished." Letter from Judge Joseph A. Sprinkle to Julius Paul dated Feb. 5, 1965.

⁹¹ Record Case No. 73313, Santa Barbara Super. Ct., July 7, 1965.

⁹² *Id.* at 3, 4.

⁹³ Probation Order, *People v. Tapia*, Case No. 73313, Santa Barbara, Super. Ct., Aug. 30, 1965.

⁹⁴ Case No. 73313 *supra* note 91, at 2.

⁹⁵ *Ibid.*

not have a previous criminal record, had kept a steady job for many years and voluntarily supported his own child.⁹⁶ However, the judge believed that both defendants had produced enough children. He recessed the hearing so that their attorneys could ask them if they would consent to sterilization if they were granted probation. The defendants did not want to make the decision during the hearing. Therefore, the judge said that he would grant probation for a three-year period, one year of which was to be spent in jail which would be automatically reduced to six months if the operations were performed.⁹⁷

In the most recent California case, a twenty-one year old girl was offered a choice between sterilization and probation, or a six months jail sentence, the maximum penalty for her offense.⁹⁸ The girl Nancy Hernandez was married at the age of seventeen and received an interlocutory divorce in late 1965. At the time of her arrest she and her two daughters, one two years old, and the other two months old, were living with Joseph Sanchez, the father of the youngest child. The Welfare Department was contributing to the support of Mrs. Hernandez and the infant and the older child was presumably being supported by her father, Tony Hernandez.

Mrs. Hernandez was arrested at the apartment when police who entered the apartment with a search warrant found marijuana and heroin there. Mrs. Hernandez was charged with and pleaded guilty to being in a room where narcotics are being unlawfully smoked or used with knowledge that the activity was occurring.⁹⁹ The probation report said that "she is a likeable person, apparently easily influenced by her associations, that she appears genuinely sorry for having committed the offense, that she has no prior criminal record . . . and that in the opinion of the probation officer she would be amenable to probation. . . ."¹⁰⁰ The report recommended probation for three years under the following conditions: that she commit no further crimes; that she not frequent any place where narcotics are dispensed or sold, or associate with users of narcotics and that she obtain permission from her probation officer or the court before leaving the county. The sterilization provision was added by the judge at the time of the probation hearing. Although no reason was given for the addition of the sterilization provision at the time of the hearing, he subsequently said "this

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 3, 4.

⁹⁸ In the Matter of Hernandez, No. 76757 Santa Barbara Super. Ct., June 8, 1966.

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* at 2.

woman is in danger of continuing to lead a dissolute life and to be endangering the health, safety and lives of her minor children."¹⁰¹

Although Mrs. Hernandez agreed to the sterilization provision at the time of the hearing, she subsequently changed her mind and refused to sign the probation order. Her attorney's motion to strike the sterilization condition from the probation order was denied but the jail sentence was reduced from six months to three months.

Mrs. Hernandez served only a few hours of her three-month term. Her court-appointed attorney filed a writ of habeas corpus with the superior court. The superior court granted the writ, ordered the sterilization provision stricken from the probation order and released Mrs. Hernandez to the supervision of the probation officer. Although the superior court judge said that there was only one question before him on the merits of the case, "Did the Municipal Court judge have the power to impose sterilization as a condition of probation?"¹⁰² almost half of his opinion was devoted to the problem of public support of illegitimate children and their mothers.

The court held that Mrs. Hernandez was not subject to sterilization under any of the three code provisions authorizing such operations¹⁰³ and that consequently the municipal court judge exceeded his judicial power when he issued a sterilization order in this case. The superior court believed that the sterilization provision was an attempt to punish Mrs. Hernandez for living with the father of her illegitimate child at the taxpayers' expense. Although the court condemned her illicit conduct, it also emphasized that this conduct does not of itself render her and the illegitimate child ineligible for aid. Furthermore, Mrs. Hernandez was neither convicted of nor charged with any violation of the welfare law. The opinion recognized that it is understandable for taxpayers to ask why they should pour their hard-earned tax dollars into supporting such a condition. The answer, however, the court said is plain. "The answer is because it is the law."¹⁰⁴

The judge was sharply critical of attempts to change the law by judicial action. "In short, as applied to cases such as the one before this Court, if the aid to needy children provisions of our welfare statutes are not to the liking of a particular judge, he may not ignore them, or substitute a penalty of his own which is not authorized by

¹⁰¹ Wash. Post, May 25, 1966, p. A9.

¹⁰² In the Matter of Hernandez, *supra* note 98, at 4.

¹⁰³ See text accompanying notes 30-45, *supra*, for a discussion of the California sterilization provisions.

¹⁰⁴ In the Matter of Hernandez, *supra* note 98, at 10.

law. It is for the people or their legislative representatives to make any change in the law that they deem desirable."¹⁰⁵

The following comments by the judge in the *Hernandez* case are equally applicable to the other California cases of sterilization by judicial order and also to the Ohio cases:

In our Country we are a people governed under law and not by the whims and caprice of men in power. . . . The courts and judges in the Judicial Branch may not enact laws nor may they set aside a law if it is constitutionally valid. They may affect law by judicial interpretation where its meaning is in doubt but they may not create a law where none exists nor may they alter the plain meaning of a statute to conform to their personal beliefs Judges may not ignore a law simply because they do not like it or believe in it. . . . Nor may a court act in excess of the power given it under the law. If an officer of the executive branch of government or a judge of the judicial branch should be permitted to act contrary to law or in excess of the power given him by law, this would mark a departure from our fundamental concept of rule by law and it would mean a reverting back to rule by men, that is to say rule in accordance with the whim, caprice and prejudices of men in power. This is wholly repugnant to our concept of government.¹⁰⁶

C. States with Sterilization Laws

Although twenty-three states have involuntary sterilization laws, this fact is not as strong an indication of support as it might appear at first glance. Only a year ago, the number would have been twenty-six states.¹⁰⁷ In 1965 two states, Kansas and North Dakota repealed their laws and Connecticut changed from an involuntary to a voluntary law. Also, only five states, Delaware, Iowa, Michigan, North Carolina and Virginia, perform twenty-five or more sterilizations annually, and in all but one of these states the number of sterilizations has decreased during the last twenty years.¹⁰⁸

The majority of the state mental retardation planning reports neither recommend increased use of sterilization nor do they advocate repeal of such legislation. They are similar to the plans of the states without sterilization laws in that they emphasize the importance of prevention but usually do not recommend sterilization as the means to achieve this goal.

The Utah report is an exception. It describes the state's program

¹⁰⁵ *Id.* at 11.

¹⁰⁶ *Id.* at 10.

¹⁰⁷ States with sterilization laws are listed in note 30, *supra*.

¹⁰⁸ See Appendix C, Part II, *infra*.

as a preventive measure not only for hereditary biological defects but also for "*prevention of the propagation of cultural impoverishment recently recognized as a primary factor in the largest clinical category of mental retardation.*"¹⁰⁹ (Emphasis added.)

The attitude of the state towards its sterilization law is principally a reflection of the views of the institution superintendent, if the extent to which the law is used is a criteria of "attitude." For example, Delaware sterilizations declined between 1952 and 1962 but in 1963 it had the highest number of reported state sterilizations per 100,000 population.¹¹⁰ Delaware also appointed a new superintendent of hospitals in July 1961 who believed it would be possible to release more patients if they had been sterilized so "I began to push the matter and more patients were released. . . ." ¹¹¹ Georgia's annual sterilization rate dropped from 112 in 1959 to an all time low of seven operations in 1963.¹¹² There were no changes in the sterilization law during that period. "The changes have been in the philosophy of the superintendent, not making it necessary for the Eugenics Board to make any decisions."¹¹³

Although sterilization is not mentioned in Virginia's Plan for Comprehensive Action to Combat Mental Retardation, there is support for the state's sterilization program in both the legislature and in the institutions. In 1960 the Virginia Advisory Legislative Council was told to review the sterilization law "in the light of knowledge most recently available to the medical profession in the fields of hereditary forms of mental illness, mental deficiency, and epilepsy in the treatment thereof."¹¹⁴

It reported that "We are advised that there are no medical or other scientific data indicating that a change in the basis set out in the statute for the sterilization of inmates of institutions is either impera-

¹⁰⁹ Utah, Mental Retardation, A Comprehensive Plan for Utah 45 (1965). The Report recommends that a special study be made of the state sterilization laws. *Id.* at 73. This recommendation is confusing because the report itself appears to have found the state program satisfactory. The basis of the decision about sterilization was changed from biological heredity to a probable permanent incompetence to perform the functions of parenthood in 1961. See Utah Code Ann. § 64-10-7 (Supp. 1965).

¹¹⁰ Paul, State Eugenic Sterilization Laws in American Thought and Practice 318 (unpublished manuscript at Walter Reed Army Institute of Research).

¹¹¹ Letter from Doctor Charles K. Bush, Superintendent of Delaware State Hospital to Julius Paul dated July 31, 1964.

¹¹² See Appendix C, Part II, *infra*.

¹¹³ Letter from Dr. I. H. MacKinnon, Superintendent of Milledgville State Hospital to Julius Paul date April 29, 1964.

¹¹⁴ Va. Gen. Assem., Jt. Res. No. 18 (1960) quoted in Paul, *op. cit. supra* note 110 at 57.

tive or desirable."¹¹⁵ The Council's conclusion about scientific evidence is puzzling, to say the least, considering the vast amount of information expressing a contrary view which has been published. Also, it is worthy of note that the Virginia Planning Report on Mental Retardation which was prepared only a few years later says:

The complexity of the problem of mental retardation is further increased by the fact that many specific determinations of MR have not, as yet, been discovered. 'Well over a hundred etiologies, diseases and syndromes have been described in which mental retardation represents a more or less important symptom. About 20 per cent of these are encountered with sufficient frequency to have practical importance.'

* * *

Not as many cases of retardation are due to genetic factors as was once believed by earlier investigators. In some individuals organic damage to some part of the nervous system can be detected as a causative factor in retardation. Prenatal infections, prematurity, birth trauma, childhood diseases, anoxia, dietary deficiencies, metabolic disorders, blood sensitivities, socio-cultural deficiencies are among some of the known causes of this complex problem.¹¹⁶

A questionnaire about sterilization administered in 1964 at one of the state institutions for the mentally retarded shows that the staff physicians and the social workers were in favor of sterilization, also favored the sterilization of the parents and/or siblings of the patient; and half of them thought the hospital should perform more sterilizations.¹¹⁷ The interviews conducted by the "Mentally Retarded and

¹¹⁵ Va. Advis. Legis. Coun., Sterilization Laws in Virginia 6 (1961) quoted in Paul *op. cit. supra* note 110 at 508.

¹¹⁶ Va., Report and Plan for Action of the Virginia Mental Retardation Planning Council 14 (1966).

¹¹⁷ The study is indebted to Dr. Michael J. Rostafinski, Director of Research and Training, Lynchburg Training School and Hospital for the use of his questionnaire and responses.

The questionnaire consisted of seven attitude questions which he administered to all of the hospitals, physicians and social workers, and to all of the secretaries and nurses present on the day it was given. The Mentally Retarded and the Law project tabulated only the answers of the physicians and social workers to questions 2 and 4.

2. I believe that the best approach to the problem of families in which there are several people affected with mental retardation would be:
 - a. To sterilize the mentally retarded patient only.
 - b. To sterilize also parents who produce mentally retarded persons.
 - c. To sterilize also parents and brothers and sisters who eventually may carry the defective trait.
 - d. Don't sterilize anybody as sterilization is ineffective as a means of decreasing the proportion of inferior people in the Society.

In question two, 2 respondents would not sterilize anyone, seven would sterilize only the patient and eleven would also sterilize the patient's parents and/or siblings.

the Law" project in the same and one additional institution also showed support for the state policy. Several interviewees also recommended involuntary sterilization on non-eugenic grounds.

In 1962 the legislature did pass a non-eugenic sterilization law but it is a voluntary one. It authorizes the sterilization of any person over the age of twenty-one upon the written request of the person and that of his spouse, if there is one. The law also applies to minors if they are mentally ill, retarded or epileptic. If the applicant is under twenty-one the statute also requires judicial determination that the operation would be in the best interest of the minor and of society.¹¹⁸

Statistics for Connecticut, Minnesota and Vermont, the three states with voluntary eugenic sterilization laws show the same downward trend in annual sterilizations as the states with involuntary laws. Neither Minnesota nor Vermont reported any sterilizations in 1963 and Connecticut which was operating under an involuntary law at the time reported only three.¹¹⁹

The sparing use of their eugenic sterilization laws by an overwhelming majority of the twenty-six states which have them indicates their doubts about the effectiveness and/or the constitutionality of these provisions. States that use their laws extensively may share these doubts. For example, North Carolina which reported more than 50 percent of the total 1963 sterilizations requires the consent of a relative and bases its sterilization program primarily on fitness for parenthood rather than eugenic grounds.

D. *The Legal View*

There are two legal viewpoints concerning the constitutionality of compulsory sterilization laws. The first theory which became prominent was that the constitutionality of sterilization statutes depends upon their scientific validity. Many proponents of this view believe that the scientific premises upon which the statutes rest are erroneous and that consequently compulsory sterilization is an arbitrary and unreasonable deprivation of liberty.¹²⁰

4. During the year of 1964 there were seven patients sterilized at Lynchburg Training School and Hospital. During the same year there were four babies born to patients in this institution and one additional patient became pregnant. I feel that we should sterilize:

a. More
b. Less

Ten favored more sterilizations, two, less, and the rest thought the number should be the same as at present.

¹¹⁸ Va. Code Ann. §§ 34-423, 424 (1964).

¹¹⁹ Human Betterment Assoc. for Vol. Sterilization Inc. of America.

¹²⁰ Bligh, "Sterilization and Mental Retardation," 51 A.B.A.J. 1059 (1965); Zenoff, "Reappraisal of Eugenic Sterilization Laws," 10 Clev-Mar. L. Rev. 149 (1961) and 173

Proponents of the second theory consider the right of procreation as a fundamental liberty which cannot be interfered with by a government order. They contend that compulsory sterilization would violate substantive due process even if the laws were based on scientific evidence.¹²¹ The analogies used by Justice Holmes to uphold this type of legislation have been severely criticized by some of the proponents of this view. Justice Holmes said, "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes."¹²² However, when the Massachusetts Supreme Court upheld the vaccination law, it said:

If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of five dollars.¹²³

Thus it has been argued that the vaccination and sterilization laws are not analogous because "so far as concerns liberty, there would appear to be a real difference between assessing a fine and compelling submission."¹²⁴

Justice Holmes also believed that if the nation could call upon its best citizens to sacrifice their lives in time of war, it should be able to "call upon those who already sap the strength of the state" to make a lesser sacrifice. This analogy has been contested on the ground that there is a necessity and an urgency that causes us to sacrifice men in self-defense which is wholly lacking in the case of eugenic sterilization.¹²⁵

The fear has also been expressed that the logic in the decision in *Buck v. Bell* might be extended beyond its present limited boundaries:

There are other things besides physical or mental disease that may render persons undesirable citizens or might do so in the opinion of

A.M.A.J. 1245-50 (1960) (An earlier version of the article appears in the American Bar Foundation's "Mentally Disabled and the Law" 183-97 (1961)); Nachsin, "Sterilization of Criminals and Mental Defectives in the United States," 11 N.Y.U. Intra. L. Rev. 157 (1956); Note, 35 Iowa L. Rev. 251 (1950), Myerson, "Certain Medical and Legal Phases of Eugenic Sterilization," 52 Yale L.J. 618 (1943). See also Guttmacher & Weihofen, *Psychiatry and the Law* 194-95 (1952).

¹²¹ See O'Hara & Sanks, "Eugenic Sterilization," 45 Geo. L.J. 20 (1956); Challenger, "Law of Sexual Sterilization in Pennsylvania," 57 Dick L. Rev. 298 (1953); Gest, "Eugenic Sterilization: Justice Holmes vs. Natural Law," 23 Temp. L.Q. 306 (1950); Berns, "Buck v. Bell: Its Effects on Public Policy" 26 (unpublished thesis in University of Chicago Library 1951).

¹²² *Buck v. Bell*, 274 U.S. 200, 207.

¹²³ *Commonwealth v. Pear*, 183 Mass. 242, 248, 66 N.E. 719, 722 (1903).

¹²⁴ Gest, *supra* note 121.

¹²⁵ O'Hara & Sanks, *supra* note 121 at 29-30.

a majority of a prevailing legislature. Racial differences, for instance, might afford a basis for such an opinion in communities where the question is unfortunately a permanent and paranoid issue.¹²⁶

In view of suggestions made by some eugenicists, the fear that the scope of eugenic sterilization laws may be expanded is not irrational. A Model Eugenical Sterilization Law proposed that the following persons be subject to sterilization:

(1) Feeble-minded; (2) Insane (including the psychopathic); (3) Criminalistic (including the delinquent and wayward); (4) Epileptic; (5) Inebriate (including drug-habitues); (6) Diseased (including the tuberculous, the syphilitics, the leprous, and others with chronic, infectious and legally segregable diseases); (7) Blind (including those with seriously impaired vision); (8) Deaf (including those with seriously impaired hearing); (9) Deformed (including the crippled); and (10) Dependent (including orphans, ne'er-do-wells, the homeless, tramps and paupers).¹²⁷

This model law also recommended the sterilization of those persons who although they did not exhibit any of the above traits, have offspring, one-fourth of whom show such traits or one-half of whom carry genes for such qualities even if the offspring does not function as a socially inadequate person.¹²⁸

Existing sterilization laws are also subject to criticism on the grounds that they violate procedural due process. Since sterilization is a drastic remedy and generally a permanent infringement of bodily integrity, those affected by laws authorizing it are at least entitled to every reasonable precaution. Thus far they have not been adequately protected. The sterilization of persons without legal authorization, before testing the constitutionality of the laws, sterilization under unconstitutional laws, and the lack of representation by counsel, are all clear illustrations of this disregard of rights. In fact, it is likely that if the United State Supreme Court reviewed some of these statutes, it would declare them unconstitutional, because the Court placed great emphasis on the procedural protections of the Virginia statute in *Buck v. Bell*.

Many of the criticisms of eugenic sterilization laws are equally applicable to sterilization based on environmental factors. The whole sterilization battle over the efficacy, morality and constitutionality of such legislation may be in the offing, this time with the proponents

¹²⁶ *Smith v. Bd. of Examiners*, 85 N.J.L. 46, 53, 88 Atl. 963, 966 (1913).

¹²⁷ Laughlin, *Eugenical Sterilization in the United States* 446-47 (1922).

¹²⁸ *Ibid.* For a criticism of these suggestions, see Myerson, "Ideal Sterilization Legislation," 43 Arch. Neur. & Psych. 453, 460-63 (1935).

using social deficiencies rather than hereditary deficiencies as the justification.

VII. THE FUTURE OF STERILIZATION LEGISLATION

Involuntary eugenic sterilization was advocated to save civilization from the imminent danger of being overrun by defective stocks who were already eating it away like internal parasites.¹²⁹ Mental illness, mental retardation, epilepsy and criminality were all believed to be hereditary. Consequently, cure for these conditions was hopeless and prevention was the only answer. For example, it was alleged if sterilization was permitted the total number of retardates would be "greatly reduced in one generation and might in several generations be practically rooted out of the human race."¹³⁰

Sterilization has proved a striking failure as a means of reducing the "unfit." Although the law is often accused of being painfully slow in its acceptance of scientific progress, this was not true in the case of sterilization. Legislators and judges accepted the claims of the eugenicists with such rapidity that today many persons question whether this swift acceptance was wise from either a scientific or a legal point of view.

The legal basis for involuntary eugenic sterilization exists but the number of operations decreases each year. During the last two decades, there has been increasing opposition to sterilization on the grounds that scientific knowledge of hereditary factors in mental disability is not sufficient to warrant its widespread use, certainly not an involuntary basis. There is also opposition to sterilization on theological, moral and social grounds. However, the objections on scientific grounds seem to have been the major cause of the drop in the number of sterilizations.

We may have an opportunity to measure the extent of moral, social, and theological objections to sterilization as a means of eliminating the unfit. It is possible that within the next few years there will be a new campaign to use sterilization to save society. This time we will be promised salvation from "poor parents" rather than "poor heredity."

Society is still burdened with mental illness, mental retardation, crime and poverty. In fact, for a variety of reasons they appear to be even larger problems than they were in the 1900's. We are still searching for ways to eliminate them and sterilization is still advocated as at least one of the solutions to the problem.

Three types of sterilization are presently being suggested: volun-

¹²⁹ Deutsch, *The Mentally Ill in America* 360 (2d ed. 1962).

¹³⁰ *Id.* at 372.

tary sterilization of the mentally disabled on eugenic grounds; voluntary sterilization without any specific grounds; and involuntary sterilization of the "unfit" on grounds of social inadequacy.

Voluntary sterilization of the mentally disabled already exists in three states. It is used infrequently in these states undoubtedly for the same reasons that the majority of the involuntary laws are inactive. Therefore, it is doubtful that the adoption of such legislation by other states would result in any substantial reduction of mental illness or mental retardation.

Voluntary sterilizations are performed for both therapeutic and non-therapeutic reasons without specific legislation in many states. The number of persons who have had such operations is unknown because the operations on males usually take place in a physician's office and are not reported to any central agency. Although women are operated on in hospitals, statistics are not kept on the number of operations.¹³¹ Many physicians refuse to perform such operations because of uncertainty about the type of situations in which voluntary sterilization is justified under state law.¹³² Two states, Virginia¹³³ and North Carolina¹³⁴ recently adopted legislation which solves this problem. In both states physicians are exempt from civil and criminal liability, except for negligence, for non-therapeutic operations if there is compliance with the provisions of the statute.

There is still considerable controversy about the propriety of allowing people to use sterilization to limit their families for economic reasons or because the family does not want any more children. An analysis of this controversy is outside the scope of the present article. Let us assume for the purposes of this article that such legislation is desirable for the general population. There are still special problems concerning the applicability of a voluntary sterilization law, on eugenic or socio-economic grounds to the mentally disabled and others classified as unfit.

One aspect of the problem although pointed out thirty years ago

¹³¹ See Paul, *op. cit. supra* note 110 at 710-13 for a summary of recent studies on the number of voluntary sterilizations. He estimates that 155,000 operations per year are performed on women under 40. *Id.* at 713.

¹³² For contrasting view on the legality of sterilization of convenience see Stetler & Moritz, *Doctor and Patient and the Law* 108-13 (4th ed. 1962); Shartel and Plant, *The Law of Medical Practice* 42-48 (1959) A.M.A. *Medico-legal Forms with Legal Analysis* 2 (1957 ed.). Hayt, Hayt & Groesekel, *Law of Hospital, Physician and Patient* 525-527 (1952).

¹³³ Va. Code Ann. § 33-427 (1964).

¹³⁴ N.C. Gen. Stat. § 90-271, (Supp. 1965); See also N.C. Gen. Stat. § 90-272-74 (1963).

in the American Neurological Association's report is still valid today:

[T]he word voluntary is frequently a mere subterfuge, in that it is often a condition of discharge from the institution that the patient be sterilized, and consequently the individual involved is in the position of being confined or confinable until he gives his consent for sterilization, which hardly makes the bargain free and equal and nullifies the real meaning of the word voluntary.¹³⁵

The choice of a twenty-one year old of sterilization over six months in jail also raises questions about the real meaning of the word voluntary. And how voluntary would be the consent of a mother faced with a choice of a sterilization or the discontinuance of welfare assistance?

Another problem about voluntary laws is their application to children. North Carolina and Virginia both sterilize very young children under their eugenic sterilization laws. Virginia sterilizes children as young as six years of age¹³⁶ and 30 percent of North Carolina's sterilizations between 1962 and 1964 were performed on children between ten and nineteen years old.¹³⁷ Neither state's voluntary sterilization law specifies any minimum age.

In fact, the application is not voluntary but is made on petition of a parent or a next friend. A court must determine that the operation would be in the child's best interest. However, one wonders what information the judge is to be given to make this decision. Will a psychiatric opinion on the effects of such an operation for the child's mental health development be required? Is a social worker going to do a study on the child and the family? What are the circumstances which make such an operation "in the best interests of the child"? These and similar questions deserve serious study by legislators considering voluntary sterilization legislation.

Another problem about voluntary sterilization laws is the capacity of a mentally disabled person to consent. Although some mentally ill and mentally retarded persons are capable of understanding the nature and consequences of the operation, others are not. Connecticut has attempted to solve the problem of consent of the incompetent under a voluntary law by providing for consent of the next of kin, or if there is none, with the approval of the board of trustees of the institution.¹³⁸

¹³⁵ Committee of the American Neurological Association, *Eugenical Sterilization* 7-8 (1935).

¹³⁶ One of the Virginia sterilization hearings observed by the Mentally Retarded and the Law concerned a six-year-old boy.

¹³⁷ Biennial Report of the Eugenics Board of North Carolina July 1, 1962 to July 30, 1964, Table 8, 20.

¹³⁸ Conn. Pub. Act No. 536 (1965).

This procedure does enable the operation to be performed but it does not make the operation a voluntary one.

Do these problems mean that the mentally disabled, criminals and the poor should be denied the benefits of voluntary sterilization? The answer to this question depends on the answers to many other questions including the following:

1. How many persons in these groups who understand the consequences of the operation, and who are in a position to make a free choice, wish to have it performed?
2. What are the attitudes towards the operation of those who have had it?¹³⁹
3. What are the possibilities of adverse consequences to the sterilized person's mental health?
4. Do the people in these groups have adequate information and training about other birth control methods?¹⁴⁰
5. What are the possibilities that a person who does not understand the nature and consequences of the operation will become pregnant without the use of any birth control method? With the use of a birth control method other than sterilization?
6. Under what conditions is sterilization in the best interests of a minor?
7. Are we willing to compensate the professionals, psychiatrists, social workers, etc., whose services are necessary in these cases?

¹³⁹ A follow-up study of 110 sterilized mentally retarded patients who were discharged between 1949 and 1958 showed that: "Almost two-thirds of the discharged patients did not approve of the sterilization operation which they had to undergo. Women, particularly the married were most likely to object to sterilization and men, particularly the unmarried, least likely. Sabaugh & Edgerton, "Sterilized Mental Defectives Look at Eugenic Sterilization," 9 *Eugenics Q.* 221-22 (1962).

¹⁴⁰ In a report of a study of a Chicago birth control clinic with 14,000 patients, it was found that 70 to 83% continued to take oral contraceptives 30 months after they came to the clinic. Eighty-three percent of the patients were non-white, nearly half had not completed high school, and one out of six were welfare. Jaffee, "Family Planning, Public Policy and Intervention Strategy," *J. Social Issues* (In Press), 14. Reports on a North Carolina birth control program report that there was skepticism, before it began as to whether AFDC mothers would be interested in limiting the size of their families and whether they could follow the instructions. "Within a few months the Department of Public Welfare began to receive applications from women in very low income groups who had learned from their friends that they had discovered a new way to prevent birth. . . . Before the end of the first year it was determined without question that women from very poor families did want to limit the number of children and would follow the necessary medical routine to make the program successful," Kuralt, "Planned Parenthood in Mecklenburg County," mimeograph, 1965 quoted in Jaffee, *supra* at 13-14.

8. Are we willing to make non-political appointments of reasonably compensated attorneys who will give the necessary legal services to the poor, the incompetent and minors for whom sterilization is recommended?

The sterilization proposal which would affect the most people is involuntary sterilization on grounds of social inadequacy. Again, this is not a new proposal. Many of the current involuntary sterilization laws provide for sterilization on other than eugenic grounds.¹⁴¹ However, the constitutionality of sterilization on this basis has not been decided. The arguments advanced in its favor are the same as those used by proponents of eugenic sterilization. Society has the right to protect itself from being swamped by mental illness, mental retardation, crime, poverty, etc., and the high financial costs of these conditions.

The difference between the two proposals is that the eugenicists argued that the prevention of procreation was necessary because children of parents having these conditions, would have these same defects, by reason of heredity. Now, the claim is that the children will have the defects because the parents are too socially inadequate to fulfill the responsibilities of parenthood.

It has been suggested that before we decide on the desirability we must attempt to answer the question, "What are we trying to prevent?"

Are we trying to prevent the entrance into our society of offsprings who because of the hereditary or environmental effects of their parents' mental disorders probably will be too socially inadequate to be able to stay out of a mental institution; too socially inadequate to be able to stay out of a penal institution; too socially inadequate to be able to earn a minimum livelihood so as not to be a burden upon the state; too socially inadequate to be able to conform to the publicly proclaimed sex mores that are often not followed in private life; or, too socially inadequate to be able to achieve some other goal of our culture?¹⁴²

Some proposals appear to be aimed primarily at cutting welfare costs.

Bills for compulsory sterilization of unwed mothers have been seriously debated in such states as Mississippi, North Carolina and Iowa and advocated in many others (including a number of northern states). Most of the proposals have failed of adoption, but they offer racist politicians and others opportunities for massive fulminations on illegitimacy, AFDC cost, and related subjects, which ap-

¹⁴¹ See Appendix A, *infra*.

¹⁴² Birnbaum, *Eugenic Sterilization*, 175 A.M.A.J. 951, 956 (1961).

pear to be aimed at intimidating unwed mothers from applying for public assistance.¹⁴³

The attempt to cut welfare costs also seems to have been the primary reason for the decisions in the *Andrada*, *Palafax*, and *Hernandez* cases.

When welfare costs are not mentioned, the argument is simply that the child, even if of normal intelligence, will be gravely handicapped by the mere fact of being reared by a feeble-minded parent.¹⁴⁴ Similar arguments are made about a child whose parents are mentally ill or criminals.¹⁴⁵ However, not all authorities agree. Leo Kanner, an eminent child psychiatrist, said:

In my 20 years of psychiatric work with thousands of children and their parents, I have seen percentually at least as many "intelligent" adults unfit to rear their offspring as I have seen such "feeble-minded" adults. I have . . . and many others have . . . come to the conclusion that to a large extent independent of the I.Q., fitness for parenthood is determined by emotional involvements and relationships.¹⁴⁶

The same arguments used to attack the constitutionality of involuntary eugenic sterilization laws are applicable to involuntary sterilization on an environmental basis. However, there are two additional arguments against the latter type of law. In *Buck v. Bell*, the United States Supreme Court proceeded on the assumption that the disabilities covered by the law were hereditary and could not be ameliorated. This is not true of sterilization on an environmental basis. In many instances environment can be changed and we are currently engaged in massive efforts to do this by providing improved pre-natal care, training mothers in child care, Project Head Start and numerous other programs for children and adults. Also, there were no practical alternatives to sterilization for preventing procreation at the time of *Buck v. Bell*, but this is not true today.

Proponents of involuntary sterilization, both in the past and today seem to imply that those who oppose these laws place the right of procreation above the welfare of society. It is possible that the day will come when this statement is accurate. The hereditary nature of these conditions may be established, or all reasonable attempts at improving the environment and rehabilitation of the disabled may fail, or food and air shortages may become so severe that there might not be

¹⁴³ Jaffee, *supra* note 140, at 9.

¹⁴⁴ Williams, *The Sanctity of Life and the Criminal Law* 86, quoted in Bligh, "Sterilization and Mental Retardation," 51 A.B.A.J. 1059, 1062 (1965).

¹⁴⁵ E.g. Guttmacher & Weihofen, *Psychiatry and the Law* 195 (1952).

¹⁴⁶ Kanner, *A Miniature Textbook of Feeble-mindedness* 4-5 (1949).

enough to bear the burden of any further growth in population, then, there will be a choice between sterilization and the rights of the individual. If the time comes when any of these conditions exists, and if efforts at birth control fail, and if we can decide who should be sterilized and who is qualified to make this decision, then perhaps legislation authorizing involuntary sterilization could be justified.

APPENDIX A EUGENIC STERILIZATION

CRITERIA FOR DETERMINING APPLICABILITY OF INVOLUNTARY STERILIZATION LAWS

Summary of Specification	State	Mentally Ill	Mentally Deficient	Epileptic
I. Eugenic				
A. According to laws of heredity, person is probable potential parent of socially inadequate offspring likewise afflicted.	Arizona	X	X	X
	Mississippi	X	X	X
	New Hampshire	X	X	X
	South Carolina	X	X	X
	Virginia	X	X	X
	West Virginia	X	X	X
B. Procreation would produce children with inherent tendency to named condition.	Georgia	X	X	
	Idaho	X	X	X
	Maine	X	X	
	Michigan	X	X	
C. Person is afflicted with mental disease which may have been inherited and is likely to be transmitted to descendants; mental deficiency; or marked departures from normal mentality.	California	X	X	
	South Dakota	X	X	
II. Eugenic or Social				
<i>Eugenic or:</i>				
A. Person or children would probably become social menaces or wards of the state.	Iowa	X	X	
	Oregon	X	X	X

APPENDIX A (*Cont.*)

Summary of Specification	State	Mentally Ill	Mentally Deficient	Epileptic
B. Patient will continue to be a public or partial public charge or supported in any manner or form by charity.	Oklahoma	X	X	X
C. It is for the best interest of the mental, moral or physical improvement of the individual or for the public good.	North Carolina	X	X	
III. Social				
A. When deemed advisable.	Alabama	X	X	
B. Procreation deemed inadvisable.	Delaware	X	X	X
	Wisconsin	X	X	
C. In the best interests of the patient and society.	Indiana	X	X	X
D. Idiot, feeble minded or insane person who is treated, trained or cared for within a custodial institution.	Montana	X	X	X
E. Mentally deficient patients eligible for parole or discharge.	Nebraska		X	
F. Person not capable of performing the duties of parenthood.	Utah	X	X	X

APPENDIX B PROCEDURAL REQUIREMENTS (INVOLUNTARY LAWS)

Initiation of Proceedings		Notice										Right to Counsel	
State	Institution Superintendent	Others	Patient	Relatives	Central Agency	Guardian	Minimum Notice Required	Independent Medical Examinations	Hearing	Presence of Patient	Adjudicating Agency		Judicial Appeal
Ala.*	X					X ¹	30 days		X	X	State Bd. of Medical Examiners	X	X
Ariz.	X		X	X	X	X	30 days		X ²		X ²		X
Cal.		X ³		X			30 days				Supt., physician and alienist ⁴		
Del.											State Bd. of Eugenics ⁵	X	
Ga.	X			X	X	X	20 days		X	X	State Bd. of Health	X ⁶	X
Idaho	X		X	X		X ¹	30 days		X	X	Governing Bd. of institution ⁸	X	X
Ind. ⁷	X		X	X		X	10 days		X	X		X ⁹	X
Iowa	X		X	X		X		X ¹⁰			Central Agency and 2 of 3 state hosp. supts., Court	X	X ⁹
Me.	X		X	X	X	X		X ¹¹	X	X ¹²	Bd. of Directors or Trustees of hospital	X	X ⁹
Mich.	X		X	X		X ¹	10 days		X		Created board ¹³	X	
Miss.			X	X	X	X	30 days		X	X	Bd. of Examiners composed of 5 physicians ¹⁴	X	
Mont.	X	Requirement for parole or discharge	X			X ¹		X ¹⁵	X	X	Bd. of institution	X	X
Neb.									X	X	State Bd. of Eugenics	X	X
N. H.	X		X	X		X ¹	14 days		X	X	Mental Health Bd.	X	X
N. C.	X		X	X		X ¹	20 days		X	X		X	X
Okla.	X		X	X		X ¹	10 days		X	X		X	X

APPENDIX B (Cont.)
PROCEDURAL REQUIREMENTS (INVOLUNTARY LAWS)

Initiation of Proceedings		Notice											
State	Institution Superintendent	Others	Patient	Relatives	Central Agency	Guardian	Minimum Notice Required	Independent Medical Examinations	Hearing	Presence of Patient	Adjudicating Agency	Judicial Appeal	Right to Counsel
Ore.		X	X	X		X					State Bd. of Eugenics	X	X ^a
S. C.	X		X			X	30 days		X	X	Exec. Comm. of State Bd. of Health	X	
S. D.	X	Requirement for parole or discharge	X	X		X	10 days		X ¹⁶	X ¹⁶	County Sub-commission for control of feeble-minded	X	X ^a
Utah	X		X			X ¹	30 days	X ¹⁷	X	X	Governing Bd. of Institution	X	X
Va.	X		X			X ¹	30 days		X	X	State Hospital Bd.	X	X ^a
W. Va.	X		X	X			30 days		X	X	Public Health Council	X	X
Wis.		Dept. of Pub. Welf.	X	X		X	30 days	X ¹⁸			Dept. of Public Welfare		

* The Alabama sterilization law has not been used since the state Supreme Court gave an adverse advisory opinion in 1935. (In re opinion of the Justices, 230 Ala. 543, 162 So. 123 (1935)).

APPENDIX B

PROCEDURAL REQUIREMENTS

(Involuntary Laws)

1. If the patient has no guardian, one must be appointed for him. *Ariz. Rev. Stat. Ann.* § 36-533 (1956); *Ind. Ann. Stat.* § 22-1605 (1964); *Mich. Comp. Laws* § 720.305 (1948); *Neb. Rev. Stat.* § 83-505 (1958); *N.H. Rev. Stat. Ann.* § 174:3 (1964); *N.C. Gen. Stat.* § 35-44(c) (1949); *Okla. Stat. tit. 43A, § 342* (1961); *Utah Code Ann.* § 64-10-4 (1953).

2. If an objection to sterilization is filed, the Director of the Department of Mental Hygiene is to make full inquiry into the matter. *Cal. Welfare & Inst'ns* § 6624. "Sterilization will not be authorized in any case unless the patient consents thereto." *Calif. D.M.H. Policy and Operations Manual*. 3520.2.

3. The board or commission having control over the state or county hospital for the mentally ill or the home for the mentally deficient. *Del. Code Ann. tit. 16 §§ 5701(a), 5702* (1953).

4. Physician and alienist are appointed by the Department of Welfare. Written consent of Department of Welfare is also necessary. *Ibid.*

5. State Board of Eugenics is composed of the directors of the Social Security Board and the State Board of Health and the superintendent of the state hospital. Any two of the above may act as the Board. *Ga. Code Ann. §§ 99-1301-1302* (1955).

6. Written consent of patient and guardian is necessary or the Board's decision must be judicially reviewed. *Idaho Code Ann. §§ 66-807, 808* (1947); *Iowa Code Ann. § 145.15* (1946).

7. Court may enter order for sterilization on the basis of the examining doctor's certificate at the same time as commitment order is made. *Ind. Ann. Stat. §§ 22-1613, 1614* (1964).

8. Decision must be reported to the Indiana Council for Mental Health which may approve or reverse the decision. *Ind. Ann. Stat. § 22-1602* (1964).

9. Court will appoint attorney or guardian ad litem if defendant does not have an attorney. *Idaho Code Ann. § 66-808* (1947); *Iowa Code Ann. § 145.17* (1946); *Mich. Comp. Laws* § 720-307 (1948); *Ore. Rev. Stat. § 436.120(4)* (Supp. 1965); *S.D. Code* § 30.0503 (1939); *Va. Code Ann. § 37.235* (1950). If there are no known relatives or legal guardian. *Me. Rev. Stat. Ann. ch. 34, § 2464* (1964).

10. Physician in charge of the case must call in a physician and surgeon to examine the patient and to decide if he is capable of consenting to the operation. *Me. Rev. Stat. Ann. ch. 34, § 2461* (1964).

11. Two physicians are to be appointed by the court. *Mich. Comp. Laws* § 720-306 (1948).

12. Unless two reputable physicians certify that it would be improper and unsafe. *Mich. Comp. Laws* § 720-307 (1948).

13. Chief physician of each hospital, president of state medical society, female named by society and secretary of Board of Health. Mont. Rev. Codes Ann. § 38-605 (1947).

14. Five "physicians" are to be from the state hospitals including three psychiatrists and one psychologist. Neb. Rev. Stat. § 83-502 (1958).

15. Two or more physicians with two years of experience who are registered in the state. N.H. Rev. Stat. Ann. § 174-2 (1964).

16. Only for mentally retarded. S.D. Code § 30.0503 (Supp. 1960).

17. The Board is to receive "the opinion of at least one medical doctor, one psychologist, and one social worker familiar with the inmate or person under judgment." Utah Code Ann. § 64-10-6 (Supp. 1965).

18. Psychiatrist and surgeon. Wis. Stat. Ann. § 46.12 (1957).

APPENDIX C*
 EUGENIC STERILIZATIONS IN THE UNITED STATES
 1907¹-1960
 PART I NATIONAL TOTALS

Year ²	Cumulative Totals	Mentally Ill	Mentally Deficient	Others
1921 ³	3,233	2,700	403	130 [*]
1928 ⁴	8,515			
1935 ⁵	20,070			
1946 ⁶	45,127	21,311	22,153	1,663
1956 ⁷	58,285	26,407	30,101	1,673
1960 ⁸	61,540	27,436	31,931	2,263
1964 ⁸	63,678	27,917	32,374	2,387

¹ 1907 is the first year in which eugenic sterilization legislation was passed.

² Totals given are for January 1st of each year.

³ Laughlin, *Eugenical Sterilization in the United States* 96 (1929).

⁴ Gosney & Popenoe, *Sterilization for Human Betterment* 184 (1929).

⁵ Committee of the American Neurological Association for the Investigation of Eugenic Sterilization, *Eugenical Sterilization—A Reorientation of the Problem* 9-20 (1936).

⁶ Deutsch, *The Mentally Ill in America* 372 (1952).

⁷ Clarke, *Social Legislation* 207 (1957).

⁸ *Human Betterment Association of America* 2 (1960).

* *Note:* The number of eugenic sterilizations which have taken place in the United States is larger than the total shown in this table. The table reflects sterilizations since 1907 when the first sterilization law became effective, and unauthorized sterilizations took place before this date. "Even before 1907, superintendents of institutions were secretly sterilizing feeble-minded persons. Several hundred males were sterilized secretly and illegally by Dr. H. C. Sharp . . . before the passage of the pioneer law." Deutsch, *The Mentally Ill in America* 370 (1952). It is also reported that in the middle of the 1890's the Superintendent of the Winfield, Kansas State Home for the Feeble-Minded castrated 58 children. Gosney & Popenoe, *Sterilization for Human Betterment* 14-15 (1929).

APPENDIX C (*Cont.*)
 PART II STERILIZATIONS IN THE UNITED STATES
 STATE TOTAL FOR 1963, 1959, 1949, and 1943¹

State	1963	1959	1949	1943	State	1963	1959	1949	1943
Ala.	0	0	0	0	Mont.	0	0	8	5
Ariz.	0	0	1	0	Neb.	10	10	16	79
Cal.	17	12	381	459	N. H.	0	1	14	24
Conn.	3	1	10	31	N. C.	240	260	249	1,152
Del.	25	0	19	17	N. D.	0	22	23	433
Ga.	7	112	167	97	Okla.	0	0	0	0
Idaho	2	0	0	0	Ore.	23	40	32	57
Ind.	12	7	49	55	S. C.	9	6	7	17
Iowa	30	14	165	58	S. D.	1	1	3	3
Kan.	0	0	0	88	Utah	0	7	14	69
Me.	1	4	3	1	Vt.	0	0	0	3
Mich.	33	27	88	78	Va.	39	69	215	203
Minn.	0	6	8	46	W. Va.	0	0	0	1
Miss.	7	15	0	4	Wis.	8	0	28	48

Totals:

1963	467
1959	614
1949	1,500
1943	1,638

¹ Human Betterment Association for Voluntary Sterilization Inc. of America.